

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA . 4:17-CR-00116-2
VERSUS . HOUSTON, TEXAS
STEPHEN E. STOCKMAN . DECEMBER 1, 2017
. 9:26 A.M.

TRANSCRIPT OF INTERIM PRETRIAL CONFERENCE
BEFORE THE HONORABLE LEE H. ROSENTHAL
CHIEF UNITED STATES DISTRICT JUDGE

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PROCEEDINGS

THE COURT: Go ahead and state your appearances, please.

MR. HEBERLE: Good morning, Your Honor. Robert Heberle, Ryan Ellersick and Melissa Annis for the United States.

MR. TABAKMAN: Gary Tabakman and Sean Buckley for Mr. Stockman.

THE COURT: Let's take up the motions to dismiss and then we can deal with the proposed jury questionnaire.

Did you get the proposed edits?

MR. BUCKLEY: I did, Your Honor.

THE COURT: Both sides got them, my edits?

MR. BUCKLEY: I don't know if I did, Your Honor. I'm sorry.

THE COURT: You need to make copies of them and give one to the lawyers. Have Lisa do that. Lisa, go ahead and do that.

(Off the record discussion held)

THE COURT: All right. Let's deal with the motion to dismiss while we are getting that. I don't have many changes, but I have some suggested revisions to make it a little easier to follow. I don't have any objection to the expanded questionnaire.

MR. BUCKLEY: If I may inquire of the Court, the only

09:27 1 concern I have from the expanded questionnaire, of course, is
2 the volume of material that would be coming back to us if we
3 were receiving the questionnaire that morning.

09:28 4 THE COURT: I'm not going to impose that. That is
5 unrealistic.

6 MR. BUCKLEY: Okay.

7 THE COURT: We will try to get them the day before and
8 see if we can maneuver it that way and try to get them without
9 having the entire panel have to come down here just to hand in
09:28 10 a paper and then go home. That doesn't make sense.

11 MR. BUCKLEY: Thank you, Your Honor.

12 THE COURT: So we will work through those logistics.

13 MR. HEBERLE: Yes, Your Honor.

14 THE COURT: All right. Okay. So it's your motion.
09:28 15 Do you want to speak to it?

16 MR. BUCKLEY: Yes, Your Honor. Thank you. The first
17 motion to dismiss relates to Counts One through Eight, and
18 although we have, as the Court is aware --

19 *(Off the record discussion held)*

09:28 20 MR. BUCKLEY: As the Court is aware, we have gone
21 through a lengthy analysis in both the initial motion and then
22 our reply to the government's response in opposition. So I
23 will -- without belaboring the litany of what we have argued, I
24 will summarize what I think the gist of our argument is.

09:29 25 As to the motion to dismiss Counts One through

09:29 1 Eight, our contention is that when viewed in the context of
2 the 7(c)(1) requirements of pleading for fraud cases and also
3 in light of the higher standard for pleading fraud that we see
4 as derived from Telemarketing Associates, which was a civil
09:29 5 case but it was a fraud accusation, that we believe that the
6 indictment, although it may be sufficient under a different
7 type of case, in the case of specific fraudulent
8 misrepresentations, that there is a failure of the indictment
9 to allege specifically that Mr. Stockman made a representation
09:29 10 that at the time he made the representation, he had a specific
11 intent to deceive the person who received that solicitation.

12 Now, what I think the indictment attempts to do,
13 which also relates to some degree to our motion to strike
14 surplusage, is that it attempts to cast the separate
09:30 15 allegations of fraud within the indictment as part of an
16 overarching scheme that occurs over a long period of time. And
17 the mechanism in that case would be to impute an intent to
18 defraud, an intent to scheme as to the individual allegations
19 in Counts One through Eight. And our contention is that that
09:30 20 is not sufficient under 7(c)(1) for fraud cases.

21 For example, the Yefsky case out of the Fifth
22 Circuit does articulate a higher standard for fraud pleadings
23 and in light of Telemarketing Associates. And for the Court's
24 reference, I note that there has been a difference in the way
09:30 25 that we have cited the case, Telemarketing Associates. It is

09:30 1 cited by the government and also the Lyons case out of
2 California, as the Madigan case. Madigan, of course, was the
3 Attorney General for the state of Illinois who prosecuted the
4 Telemarketing Associates case. So that is the same case that
09:31 5 we are each citing using different citations.

6 The government has also with regard to the
7 pleading standard imposed by Telemarketing Associates cited and
8 drawn the Court's attention to the Lyons case out in
9 California, which was also a case involving telemarketers.

09:31 10 We believe that the cases can be distinguished
11 from Mr. Stockman's indictment because in the Lyons case, the
12 indictment was specific and did contain specific allegations of
13 an intent to deceive at the time of the solicitations.

14 And I would draw the Court's attention and
09:31 15 conclusion to that particular motion to dismiss to a couple
16 other distinctions factually even derived from the face of the
17 indictment.

18 In a telemarketing case, the essence of the fraud
19 is that you have a telemarketing program that is ongoing and is
09:32 20 in effect like a rolling scroll of activity. And in the course
21 of that rolling scroll of activity, you can see -- the people
22 who are operating the telemarketing or the charitable
23 solicitation can see what percentage in realtime of these -- so
24 the donations are actually going to various different purposes,
09:32 25 including overhead or telemarketing services, for example. And

09:32 1 that was the essence of the misrepresentation is that, for
2 example, you know, I'm calling someone on the phone and I say,
3 hey, a significant portion of what you donate will go to the
4 charitable cause.

09:32 5 And at that time, the people making the calls,
6 the people responsible for that telemarketing scheme would know
7 whether that was a correct assertion or not. And in the
8 government's indictment of Mr. Stockman, there is no indication
9 that any of the expenditures that the government claims were
09:33 10 not in conformity with the solicitation could ever have been
11 known by Mr. Stockman at the time he made the solicitation.

12 The other, I think, distinguishing difference is
13 that in a telemarketing case, you're dealing with someone on
14 the other end who is receiving a solicitation who is
09:33 15 potentially only sophisticated enough to know how to answer a
16 phone and talk to someone on the phone. And in this case, in
17 Mr. Stockman's case, even by the face of the indictment, we're
18 dealing with sophisticated, self-made, successful businessmen
19 who run charitable foundations. Even within the context of the
09:34 20 Schaumburg trilogy and Telemarketing Associates, the Supreme
21 Court has noted that sophisticated donors are held to -- I
22 don't know if I'm using the right term "held to," but there is
23 a different set of concerns, and they have a lesser concern
24 with regard to the state's or the government's need to police,
09:34 25 prevent, punish fraud for these types of donors.

09:34 1 So I would say that with respect to the type of
2 allegations and the type of individual who is involved here,
3 the government has less of an interest and the First Amendment
4 interest in having these communications would likewise
09:34 5 correspondingly be higher.

6 Moving on to Counts Nine through Eleven, the
7 essence of this is that our complaint for all of these counts
8 stems from what we believe to be the government's failure to
9 allege that at the time of this alleged Conduit contribution
09:35 10 that Mr. Stockman gave money to Mr. Posey and Mr. Dodd for the
11 alleged purpose of making a Conduit contribution.

12 We believe that the explicit absence of that
13 allegation in the indictment is fatal to Count Nine and that
14 the derivative effect on Counts Ten and Eleven would be fatal
09:35 15 to those counts because, of course, the reporting requirements
16 are derived from the source of the funds.

17 Count Twelve is -- frankly, it was hard enough
18 for me to get down on paper and understand what I wrote. It is
19 even more difficult for me to try to articulate it verbally
09:35 20 except I will say that what seems to be the problem here is
21 that the government has alleged in the indictment, on the face
22 of the indictment a solicitation by Mr. Stockman for an
23 independent expenditure and then a fraudulent conversion of
24 that funds -- those funds to a coordinated expenditure.

09:36 25 And we think that on the face of the indictment,

09:36 1 based on the vagueness of the statute, taking into account the
2 SEC's regulatory scheme and case law from the Fifth Circuit and
3 the Supreme Court addressing a limiting construction to
4 statutes that regulate speech like this but do not specifically
09:36 5 employ a term "express advocacy," that without that limiting
6 construction, any kind of regulation of that type of speech
7 rules afoul of the First Amendment.

8 And, secondly, I think the main point of
9 contention between us and the government seems to be that the
09:37 10 government in its indictment has alleged in particular that the
11 newspaper involved in Count Twelve constituted express
12 advocacy. And we believe that the government must be held to
13 prove that standard that they have alleged, or that fact that
14 they have alleged, and that the face of the newspaper, which is
09:37 15 integrated into the indictment by reference and made available
16 to us through discovery, negates on its face the idea of
17 express advocacy. So we believe that that count must fail as a
18 matter of law.

19 Regarding the motions to dismiss Fourteen through
09:37 20 Twenty-two, Twenty-four and Twenty-seven, these are the
21 money-laundering counts. And Count Twenty-seven, the last of
22 these, is the only count as far as I'm aware that relates to
23 18 United States Code 1956. The other counts relate to 1957,
24 which, as the government correctly points out, is the spending
09:38 25 money laundering statute as opposed to the concealing one.

09:38 1 And so to the degree that the additional language
2 in 1956 may cure some of the complaints that we have about the
3 1957 allegations, I recognize that possibility without
4 conceding it. But as to the 1957 allegations, our beef is
09:38 5 essentially structurally that if you have, particularly in the
6 context of a charitable solicitation operation, a -- somehow a
7 finding that some fraud has been affected or taken place within
8 the context of this charitable solicitation, but
9 notwithstanding that, that charitable donations came into the
09:39 10 organization and then donations were either used to fulfill the
11 intent of the donors or to engage in other legitimate First
12 Amendment activity consistent with the purpose of the
13 charitable organization, that that would seemingly be, as
14 applied, an infringement of First Amendment rights to then
09:39 15 punish those monetary transactions as part of a
16 money-laundering scheme. And that's the gist of our argument
17 there.

18 I agree with the government that there seems to
19 be no authority for this proposition. I haven't found any.
09:39 20 The government has pointed out that I haven't proposed a
21 solution to it.

22 At the same time, I don't think it is
23 Mr. Stockman's job to come up with a way that he can be charged
24 under the money laundering statute. So I do think -- and I'm
09:39 25 not -- this is not a First Amendment over-breadth challenge

09:39 1 where I have not said I'm finding some conceivable way that the
2 money laundering statute violates First Amendment rights, so,
3 therefore, the whole thing should be invalidated. I'm not
4 saying that as all. This is an applied challenge in this
09:40 5 particular case to these particular circumstances.

6 Regarding our motion to strike surplusage --

7 THE COURT: Why don't we take up the dismissal motion
8 first?

9 MR. BUCKLEY: Yes, Your Honor.

09:40 10 THE COURT: Unless they are so closely related that --

11 MR. BUCKLEY: Yes. And I believe that those are
12 the -- I think I have completed the various dismissal motions
13 unless I omitted one.

14 THE COURT: I think that's correct.

09:40 15 MR. BUCKLEY: There is one other point I forgot to
16 make with regard to One through Eight.

17 THE COURT: All right.

18 MR. BUCKLEY: If I may have a moment, Your Honor.

19 THE COURT: That's fine.

09:41 20 *(Pause)*

21 MR. BUCKLEY: I don't recall what it was, so I will
22 conclude that with, Your Honor, with regards to the motions to
23 dismiss.

24 THE COURT: Thank you.

09:41 25 MR. HEBERLE: Your Honor, we divided responsibility

09:41 1 for the various motions to dismiss, so what we would like to
2 do, if this is acceptable to the Court, is each of us can
3 address the motions that we specialized in.

4 THE COURT: That's fine.

09:41 5 MR. HEBERLE: And I will begin with the motion to
6 dismiss the fraud counts, Counts One through Eight.

7 Defense counsel has relied heavily on the
8 Telemarketing Associates or Madigan case, and I think it is
9 important for the Court to note both in that case and in all
09:41 10 the cases that preceded it, which dealt with prophylactic
11 statutes that capped the amount of funds raised that can go to
12 legitimate overhead expenses, that there is a corridor opened
13 for fraud actions. That the First Amendment, although it does
14 protect legitimate charitable solicitation, provides --
09:41 15 emphatically provides no protection whatsoever for fraudulent
16 misrepresentations designed to convince someone to donate to a
17 charity that is, in fact, a sham.

18 Because the indictment here asserts such a
19 scheme, there is no First Amendment protection for it. I think
09:42 20 that that is what the Ninth Circuit held in the Lyons case,
21 which dealt with a scheme that is very similar to that alleged
22 here. That is, a scheme in which the charities were set up not
23 for the purpose of engaging in legitimate charitable activity
24 but rather for the purpose of lining the defendant's pockets.

09:42 25 The indictment here is hardly a barebones

09:42 1 indictment. It is 46 pages long. The fraud scheme itself is
2 alleged in approximately 35 paragraphs. It is not just a
3 recitation of the elements of the offense. It's the purpose of
4 the scheme, the manner and means of the scheme. It is four
09:42 5 specific occasions in which the defendant went to donors and
6 misrepresented what he was going to do with their money and
7 then almost immediately started diverting that money for other
8 purposes. So because that fraud action has been alleged in
9 detail, it not only has no First Amendment protection in this
09:43 10 case, it also provides sufficient notice to the defendant and
11 is sufficient under the pleading standards of the federal
12 rules.

13 I just want to respond to a couple of particular
14 comments that Mr. Buckley made. Mr. Buckley seemed to suggest
09:43 15 that there is no allegation in the indictment that the
16 defendant ever made a knowingly false statement. That is, that
17 he said something and at the time he said it, he intended to
18 divert the money. To the contrary, the indictment repeatedly
19 states that the defendant misrepresented things; that he used
09:43 20 false pretenses in his solicitations.

21 The purpose of the scheme, paragraph 17 in the
22 indictment, states that the purpose of the scheme was for the
23 defendant and his codefendants unlawfully to enrich themselves
24 and to fund their political activities by fraudulently
09:43 25 soliciting and receiving hundreds of thousands of dollars in

09:43 1 donations from charitable foundations based on false pretenses.

2 The manner and means of the scheme, paragraph 18,
3 says the defendant repeatedly made false representations in
4 soliciting hundreds of thousands of dollars in donations from
09:44 5 charitable foundations and the individuals who ran those
6 foundations. And so repeatedly -- and this occurs again when
7 the specific occasions are described in which the defendant
8 went to donors. The defendant went to donors and made false
9 representations. He lied about how he was going to spend the
09:44 10 money. He took the money and then he, in fact, did divert the
11 money. So this case is not just about diversion of funds. It
12 is about fraudulent misrepresentations, and that's exactly the
13 kind of thing that has no First Amendment protection whatsoever
14 under the Madigan case.

09:44 15 I also understand defense counsel to be saying
16 under Schaumburg, Munson and Riley, there is some sort of
17 heightened pleading standard when a defendant is dealing with a
18 sophisticated donor. I don't remember any discussion of that
19 sort of heightened pleading requirement in those cases. Even
09:44 20 if that is the case here, the detailed indictment, the
21 extremely detailed allegations regarding each of these
22 solicitations that was made and what happened to the funds
23 would more than clear that hurdle. And so that would be our
24 response on the motion to dismiss the fraud counts, unless the
09:45 25 Court has any further questions.

09:45 1 What we would like to do, Your Honor, is
2 Ms. Annis will go ahead and speak to the Court on Counts Nine
3 through Eleven.

4 THE COURT: Before Ms. Annis gets up, is there any
09:45 5 response you want to make to the arguments you just heard?

6 MR. BUCKLEY: Thank you, Your Honor. Yes.

7 The government, Mr. Heberle, distinguishes
8 correctly between the Schaumburg trilogy and Telemarketing
9 Associates in the sense that the Schaumburg trilogy addressed
09:45 10 prophylactic measures regulating telephone or other
11 solicitations, while the Telemarketing Associates case was a
12 fraud action. However, Justice Ginsburg, who wrote
13 Telemarketing Associates, pointed out and stated in that
14 opinion that a bare allegation of fraud does not carry the day.
09:46 15 I think I'm paraphrasing her. Bare allegations of fraud cannot
16 carry the day.

17 Our contention is that Telemarketing Associates
18 sets forth a pleading standard, not simply an open -- gaping
19 open window that if you allege fraud in a one-dimensional or
09:46 20 even two-dimensional sense, that that gives you carte blanche as
21 the government to go in and put any defendant in the position
22 of having to defend himself against the allegations.

23 And that does relate in some sense to one of the
24 regulatory schemes that was addressed. I don't recall which
09:46 25 case it was in the Schaumburg trilogy, but the Supreme Court

09:47 1 noted that putting a defendant, even in a civil matter, in the
2 position of having to defend themselves in order to make the
3 speech requires even speech that was not otherwise required,
4 which is a regulation on speech or may chill speech
09:47 5 unconstitutional.

6 So another point that Mr. Heberle brought up was
7 the length of the indictment and the -- I think the
8 thoroughness of it in addressing the allegations, with the
9 argument, as I understood it, that that lengthy indictment must
09:47 10 surely encompass all of the intent to defraud and the
11 explanation underlying the intent to defraud that would both
12 properly charge Mr. Stockman and put us on notice of what was
13 charged. But I think that there is a difference certainly
14 between an indictment that is voluminous and -- pardon me; I
09:48 15 had a brain freeze -- that is both voluminous and sufficient as
16 to each individual count. And an indictment like this one
17 which just because of the sheer number of allegations it makes
18 may appear to be more sufficient cumulatively, and I believe
19 that it is not.

09:48 20 With regard to whether this fraudulent scheme
21 that is being alleged by the government is explicit enough to
22 impute, which as I understand what is being done to impute or
23 infuse an allegation of specific intent to defraud into each of
24 these misrepresentations or false pretenses that are stated in
09:48 25 the indictment is what we disagree with.

09:49 1 We believe that as to each of the false
2 statements or misrepresentations, there needs to be an explicit
3 allegation that Mr. Stockman knew or intended at the time of
4 those solicitations, that the solicitation was false or
09:49 5 fraudulent, a specific intent to defraud or deceive. We
6 believe that that should not be imputed by this blanket
7 allegation of a fraudulent scheme, which is, we think, an
8 artificial construct in this case, and it should be more
9 specific.

09:49 10 Thank you.

11 THE COURT: Anything further?

12 MR. HEBERLE: Your Honor, I would just briefly mention
13 in response to Mr. Buckley's last point that every one of the
14 counts of fraud in the indictment specifically incorporates all
09:49 15 the preceding paragraphs of the indictment, which include the
16 allegations regarding the purpose of the scheme and the manner
17 and means of the scheme, which include the numerous assertions
18 that the defendant perpetrated the scheme through affirmative
19 false representations that I read before.

09:50 20 With that, unless the Court has any further
21 questions for us, I will let Ms. Annis address the Court on the
22 next motion. Thank you.

23 THE COURT: All right.

24 MS. ANNIS: Your Honor, with regard to Counts Nine,
09:50 25 Ten and Eleven, basically the conspiracy count is more than

09:50 1 sufficient in addressing the elements of the offense of
2 conspiracy, and it sets out in sufficient detail to apprise the
3 defendant of the objects of the conspiracy and the information
4 the United States contends that lead to the conclusion that
09:50 5 those were the two objects of the conspiracy.

6 The suggestion that the indictment is fatal
7 absent a specific allegation that the purpose at the time the
8 money was turned over to Mr. Dodd and Mr. Posey was to make a
9 conduit contribution is not an element of the offense. It does
09:51 10 not need to be pled in the indictment, and the indictment is
11 not, therefore, fatal, and it does not have any kind of
12 derivative affect on the two 1001 counts found in Counts Ten
13 and Eleven.

14 There is certainly case law which specifically
09:51 15 addresses the kinds of complaints that the defendant has raised
16 as to each of these counts, frankly with regard to the minutia
17 that he thinks should be pled in the indictment.

18 Frankly, indictments need not exhaustively
19 recount the facts surrounding the crime's commission. That is
09:51 20 a statement made by the Seventh Circuit in 1997 in U.S. versus
21 Agostino, and I think it really kind of highlights the kind of
22 complaints that are being made here, which go to defensive
23 theories and plans that the defendant might like to make with
24 regard to planning how things may go in the courtroom later but
09:52 25 are certainly not required or necessary to a sufficient

09:52 1 indictment which would notify him of the charges that he must
2 face and that keep him from being placed in jeopardy for being
3 tried for the same crime on more than one occasion.

09:52 4 With regard to Counts Ten and Twelve -- excuse
5 me -- Ten and Twelve, the 1001 charge sets out exactly the
6 elements of a violation of Title 18 1001. The requests -- or
7 requirement imposed in the defendant's objections for
8 additional information are not required, and the United States
9 has done a more than adequate job, both in the counts
09:53 10 themselves and in the preceding paragraphs of providing him
11 specific information about exactly what happened that led to
12 the 1001 violation. Specifically, it states that the false
13 statement to the SEC regarding the attribution of the campaign
14 contributions when the defendant knew that the money had been
09:53 15 provided by him to Mr. Posey and Mr. Dodd and that he obtained
16 the money by fraud from Person B and Foundation B, the statute
17 itself makes clear that no person shall make a contribution in
18 the name of another or knowingly permit his name to be used to
19 effect such a contribution.

09:53 20 The question becomes whether the language of the
21 statute embraces the conduct at issue. And as the O'Donnell
22 court and the Danielczyk court have both noted when they
23 reviewed similar objections, at least to the fact that their
24 complaints of the indictment doesn't speak specifically to
09:54 25 their conduct, both courts indicated that the language Congress

09:54 1 choose was broad rather than specific. And we think that the
2 indictments, as alleged, are not fatally defective and the
3 defendant's motion should be denied.

4 THE COURT: Response?

09:54 5 MR. BUCKLEY: Briefly, Your Honor. Our beef with
6 these conduit contribution counts, Your Honor, is that while I
7 would tend to agree with the government's position that the
8 structure of the allegations, for example, in Count Nine, could
9 be seen as structurally sufficient; however, when you actually
09:54 10 look at what they are saying, they are saying that Mr. Stockman
11 committed a conduit contribution or a conspiracy to commit a
12 conduit contribution with his own money, which is not a
13 contribution in the name of another.

14 So we think the substance of what is being
09:55 15 alleged is frankly so incongruous and confusing that it
16 undermines any other proper notice that the statute -- pardon
17 me -- that the indictment might otherwise be giving as to Count
18 Nine and that, in essence, Ten and Eleven flow from that
19 ambiguity and are defective, as well, for that reason.

09:55 20 THE COURT: All right. Anything further on that?

21 MS. ANNIS: Well, I guess the only response that I
22 have, Your Honor, is that there is no question, as you read the
23 indictment, that what is alleged in the indictment is that
24 Mr. Stockman conspired with Mr. Posey and Mr. Dodd. He
09:55 25 provided them cash that he got from his fraudulent activities

09:55 1 and the cash was to be used to turn around and make this
2 conduit payment. It was represented to the campaign to be a
3 campaign contribution. It was represented to be a campaign
4 contribution in the name of someone other than Mr. Stockman and
09:56 5 initially someone other than Mr. Dodd or Mr. Posey. The
6 initial contribution was in the names of their parents. We
7 think that is not confusing. It is pretty straightforward and
8 laid out in the indictment in detail.

9 THE COURT: We have a motion to dismiss Count Twelve
09:56 10 and then Fourteen through Twenty-two. Are you doing the rest
11 of them?

12 MR. ELLERSICK: I'm doing Count Twelve, Your Honor,
13 and then we will go back to Ms. Annis for the remainder of the
14 counts.

09:56 15 Defense counsel indicated Count Twelve is
16 complicated and confusing, but he actually summed it up in
17 about two sentences. Mr. Stockman solicited money, assisted in
18 soliciting money for an independent expenditure and then used
19 the money for a coordinated expenditure. The first part of
09:57 20 that -- part of that relates to the fraud. The coordinating
21 expenditure is Count Twelve and it's -- originally, there was
22 some discussion in the motion to dismiss, their first filing,
23 that we needed to get into the various SEC regulations,
24 advisory opinions. It seems now that we are on the same page,
09:57 25 that we don't need to go there. We are talking about the

09:57 1 statute, and the statute lays out the language for coordination
2 in a very clear way that the Supreme Court has already rejected
3 a vagueness challenge to, and I think the only -- the hang up
4 that the defense has with Count Twelve is I think that you can
09:58 5 only have a coordinated expenditure if it involves express
6 advocacy, and that has been rejected by the Supreme Court in
7 McConnell, by the district court in McConnell, by the DC Court
8 of Appeals, twice by the district court in the District of
9 Columbia. And so the whole discussion about express advocacy
09:58 10 really has no application in the context of a coordinated
11 expenditure. That's our basic point. So there is no need to
12 get into anything about express advocacy here. And that has to
13 be the case, Your Honor, because I can think of a hundred
14 examples where a candidate needs to fund various
09:59 15 campaign-related expenses, so a candidate could have expenses
16 to set up their campaign headquarters. They need to pay rent.
17 They need to buy dozens of computers. Maybe they need to pay
18 legal services. These are all campaign-related expenses. And
19 if the defense argument were correct, then if a coordinated
09:59 20 expenditure only applied to express advocacy, that candidate
21 could go to their wealthy friends and say, hey, I need you to
22 pay for these various campaign-related expenses out of your own
23 pocket; they don't relate to express advocacy so there is no
24 prohibition on us coordinating this. And that would result in
09:59 25 a complete erosion and destruction of the campaign contribution

09:59 1 limits. So you don't need to have express advocacy in order to
2 have a coordinated expenditure. It is not alleged in the
3 indictment because it is not required under the law.

4 What is alleged in the indictment is that the
10:00 5 defendant engaged in this coordinated expenditure that resulted
6 in excessive campaign contributions, involving the publication
7 and distribution of this newspaper. It is straightforward.
8 The Supreme Court has found that the language is
9 straightforward. It is not vague. And so we would ask that
10:00 10 the Court reject or deny the motion to dismiss on Count Twelve.

11 THE COURT: All right. Thank you.

12 Anything you wanted to add?

13 MR. BUCKLEY: Thank you, Your Honor.

14 Let me immediately address what I think is a
10:00 15 misstatement from the government that the indictment does not
16 allege express advocacy. First of all, the indictment does
17 allege express advocacy. It alleges -- and I quote -- in the
18 form of expenditures by Center for the American Future for
19 specific advertising, advocating for Stockman's election and
10:00 20 attacking Stockman's opponent. That is a textbook definition
21 of express advocacy. Furthermore, the government is overly
22 dismissive of the SEC regulatory scheme in this case, which,
23 throughout the court opinions across the United States and
24 within the Fifth Circuit, is relied on to fill gaps left by the
10:01 25 statutory scheme. In particular, the government refers to

1 McConnell versus FEC as an indication that express advocacy has
2 been abandoned in some sense as a requirement, but McConnell
3 dealt with electioneering communications and not the type of
4 expenditures are that being addressed in this case -- or
5 alleged in this case. And the indictment did not allege that
6 this is a functional equivalent of express advocacy. It
7 alleges express advocacy. Furthermore, as we have cited in our
8 response or our reply to the government's response in
9 opposition, the Fifth Circuit has in two other cases, Center
10 for Individual Freedom versus Carmouche, which is '06, and then
11 before that, Chamber of Commerce of the United States versus
12 Moore in 2002, that a limiting construction of express advocacy
13 is required to prevent First Amendment infringement of the
14 types of communications that the government is alleging in this
15 case.

16 So with those clarifications, thank you.

17 THE COURT: Anything further?

18 MR. ELLERSICK: Your Honor, I think by using the word
19 "advocating" in the indictment doesn't mean that we are
20 alleging express advocacy. That's not required under the law
21 for a coordinated expenditure. McConnell resolves that. If
22 the Court has any question about the fact that that has been
23 resolved, I would point the Court to the McConnell decision and
24 particularly the McConnell district court decision, which very
25 clearly, if I could just read the two sentences where they

1 resolve this. At the district court level at page 249, the
2 Court says, "Plaintiffs contend that the First Amendment limits
3 the coordination concept to express advocacy." That's the
4 defendant's argument here. "This view has been rejected by
5 courts in this circuit."

6 Then it cites the Orloski case and the Christian
7 Coalition case, and that reasoning was essentially adopted by
8 the Supreme Court in McConnell. So the express advocacy
9 discussion is really besides the point. In the Fifth Circuit
10 cases that talk about express advocacy, they are talking about
11 it in the context of an independent expenditure, not the
12 coordinated expenditure that is an excessive campaign
13 contribution. That's where we are. Mr. Stockman has been
14 charged with making an excessive campaign contribution through
15 coordination, and so the express advocacy limitation does not
16 apply.

17 THE COURT: Thank you.

18 Final argument, I think, is Fourteen through
19 Twenty-two, Twenty-four and Twenty-seven.

20 MS. ANNIS: Yes, Your Honor, just briefly. If I
21 understand -- and I'm not claiming --

22 THE COURT: I think as applied.

23 MS. ANNIS: I get that. And I think the point I'm
24 trying to make is that in his -- I will call it a hypothetical,
25 because I'm not sure what else to call it, assuming the jury

10:04 1 convicts for fraud and the hypothetical being that the
2 financial transactions at issue in these counts somehow bear
3 some nexus to the intent of the donor, number one, I'm not sure
4 how to interpret that. One of the reasons I set out a little
10:05 5 bit about what has been alleged in each of those counts is to
6 demonstrate, number one, there is no protected speech
7 associated with those -- he calls them expenditures. I call
8 them financial transactions.

9 Secondly, a nexus that has some nexus to the
10:05 10 donor's intended charitable goals is not obvious to me either.
11 And so I submit that as applied to the actual facts in this
12 case, there is no First Amendment issue. There is no problem
13 with the particular transactions, and there would be no
14 violation if a jury were to convict both for fraud and for
10:05 15 money laundering for each of these counts.

16 THE COURT: Anything else?

17 MR. BUCKLEY: Briefly, Your Honor. I will try to make
18 it brief.

19 THE COURT: That's fine.

10:06 20 MR. BUCKLEY: As I did mention earlier, I'm not aware
21 there is any case law addressing this particular point, but I
22 do disagree with the government's position that this involves
23 no protected speech or no chance at protected speech.

24 If you conceptualize a charitable organization
10:06 25 that has outflows of cash that may represent First Amendment

10:06 1 protected speech or other First Amendment protected activity,
2 that is a model of what is protected by the First Amendment.
3 And you add in some taint of fraud at some point in the
4 solicitation, the government's position is that, in essence,
10:06 5 like a Medicare billing that's predicated on a fake Form 485,
6 that affects the legitimacy of the entire flow. Our position
7 is that it cannot and it should not, if you have some
8 fraudulent taint, which I'm not conceding, but if there was, it
9 cannot negate the entire First Amendment interest that would
10:07 10 otherwise be present in this count. Thank you.

11 THE COURT: All right.

12 MS. ANNIS: The only thing I would add, Your Honor, is
13 it has been our contention throughout the indictment that there
14 is no real charitable organization with charitable goals.

10:07 15 THE COURT: And I think that both sides did a very
16 good job briefing and identifying the issues in advance, which
17 is much appreciated. And the additional argument here today
18 has been helpful.

19 I think that in general on the motions to dismiss
10:07 20 is that many of the arguments that Mr. Stockman is making go to
21 either the veracity or the characterization of the facts, and
22 that's not what the Courts recognize as an appropriate basis
23 for dismissing an indictment pretrial.

24 The question is whether it is a
10:08 25 legally-sufficient indictment, and the issue is whether it

1 alleges the facts that, if true, state the elements of the
2 offense. So as we go through the various arguments, I will
3 take them in the same category that the government argued them.

4 Counts One through Eight, the mail and wire
5 fraud, I don't think the First Amendment argument gets you
6 where you want to go on behalf of Mr. Stockman. There is a
7 clear distinction that the government properly emphasized
8 between protecting the right to engage in charitable
9 solicitations and a First Amendment shield for that, on the one
10 hand, and fraud on the other.

11 This is not a case in which the allegation is
12 simply, well, money used is going to be for X purpose, but
13 there is a certain overhead amount, or they are charging a high
14 commission, something of that sort. Absent the kind of
15 circumstances that were pointed out, if the alleged
16 misrepresentation is you are getting the money thinking it is
17 for X and, in fact, it is simply for an entirely different Y,
18 there can be actionable fraud, criminally actionable fraud.
19 And the allegations in this indictment in great detail specify
20 how, when, to whom and what misrepresentations Mr. Stockman
21 allegedly made to obtain donations from charitable foundations
22 or individuals for a specific purpose, purposes, and, in fact,
23 none of those purposes were the purpose of the -- or the use
24 made of the contributions. Instead, they were used to pay for
25 personal expenses, for political expenses and to finance

10:10 1 contributions to campaigns that were themselves illegal. I
2 don't think that this fails because it treads on First
3 Amendment protected grounds.

4 I also think it shows -- it alleges sufficient
10:10 5 facts to show an attempt to defraud. Solicitations, yes, they
6 do not need to specify exactly how the donations will be spent,
7 but, again, these allegations go a lot further. These
8 allegations are that Mr. Stockman said, you are buying a
9 promotion, an enhancement of a purchase of a building called
10:11 10 the Freedom House. That, instead, that money didn't go to
11 anything called the Freedom House. It went instead to personal
12 and political expenses of Mr. Stockman. That there would be
13 funds used for the Center for the American Future. Instead,
14 used the money for his own purposes. Sent an email stating
10:11 15 that donor funds were used to deliver medical supplies to Third
16 World nations and support Freedom House. Again, that didn't
17 happen. Went to personal expenses of Mr. Stockman, went to
18 political expenditures of Mr. Stockman and for other purposes
19 that were unrelated to the charity that was described and the
10:12 20 charitable purpose described.

21 Mr. Stockman clearly disagrees with the
22 characterization given to what he said or what people working
23 on his behalf said. That's the stuff for trial, not for a
24 motion to dismiss.

10:12 25 MR. BUCKLEY: Pardon me, Your Honor. Please excuse

1 the interjection. I realized what I forgot to mention earlier.
2 I think it is important. We had also lodged a multiplicity --

3 THE COURT: I understand. We will get there.

4 MR. BUCKLEY: Thank you, Your Honor.

5 THE COURT: There is an argument, as well, about the
6 delay in the filing of the charge.

7 Anything more the parties want to say about that?

8 MR. BUCKLEY: That was, Your Honor, a complaint as
9 to -- that was in connection with our motion to strike
10 surplusage. That was my intent.

11 THE COURT: All right. So we can wait on that one.
12 And the multiplicitiness of the charges in these counts of the
13 indictment, I don't think that the charges -- the argument is
14 that the separate charges for mail and wire fraud relate to a
15 single charitable donation in response to one solicitation. It
16 is all one transaction. I think that is the parties' argument.

17 MR. BUCKLEY: If I may just add briefly to that. In
18 the government's response in opposition, the government pointed
19 out an analysis that I frankly missed in my initial motion. I
20 agree with it except as to Counts Three and Four. Quickly, my
21 rationale for that is that Count Four alleges a \$450,000 check
22 from Person B, which, according to the indictment, Mr. Stockman
23 caused, fraudulently caused.

24 Then Count Three alleges a letter that is in
25 respect and before the issuance of that check. So my position

1 is that Count Three may well be part of the cause, and there is
2 nothing that explicitly carves out and they may, in fact,
3 relate to the same -- they may be indistinguishable. That is
4 my complaint as to Three and Four, and the other ones I have
5 withdrawn.

6 THE COURT: All right.

7 MR. HEBERLE: Your Honor, on Three and Four, those are
8 two different mailings. That's why they are two different
9 counts. The case law is extremely clear in every circuit,
10 including the Fifth Circuit, that you can have multiple
11 violations of the mail or wire fraud statutes in connection
12 with a single scheme to defraud if you have multiple mailings
13 or multiple wires. And these are two different mailings on two
14 different dates. They are specified in the indictment. That
15 is on its face sufficient to proceed to trial on those counts.

16 MR. BUCKLEY: My disagreement with that in this
17 particular case is that the mailing in Count Four is charged as
18 an offense because it is against Mr. Stockman because the
19 allegation is that he caused it, and the allegation in Count
20 Three may well be what caused it. So my position is that I
21 don't think the fact that a third party mails something is in
22 and of itself an offense unless there is a nexus to his cause,
23 so I see them as perhaps indistinguishable.

24 MR. HEBERLE: Your Honor, he caused two different
25 mailings. And because he caused two different mailings, he

1 violated the mail fraud statute two times.

2 THE COURT: I think it passes the multiplicitiness
3 test as applied. I understand your argument. I don't think
4 that it has traction.

5 MR. BUCKLEY: Understood, Your Honor.

6 THE COURT: All right. Counts Nine through Eleven,
7 again, the arguments presented were helpful, but I think that
8 the indictment sufficiently details the object of the
9 conspiracy, the contribution, the false statement to the
10 Federal Election Commission, the details of how the \$350,000
11 was obtained, how it was given to Dodd and Posey for the
12 purpose of campaign contributions, how the report was filed
13 attributing the contributions to the parents of those two
14 individuals.

15 It seems to me that there is a sufficient basis
16 at a minimum for alleging the elements required by law for a
17 conspiracy involving Stockman, Posey and Dodd to make a conduit
18 payment and make a false report to the SEC. So I'm going to
19 overrule that motion, as well.

20 That takes us to Count Twelve, excessive
21 contributions. I don't think it is a -- I think that there is
22 a sufficient allegation of a crime, and the complicated
23 regulatory structure that is related to the statute does not
24 put the Court in a position of inappropriately having to
25 resolve regulatory difficulties, to the extent that is your

1 argument. It may be complicated, but the indictment quotes the
2 statute. It doesn't quote the regulations for the elements of
3 the offense. There isn't a notice problem to Mr. Stockman.
4 The indictment sets out the statutory framework, details how
5 the conduct allegedly violated it. I think the express
6 advocacy argument does not warrant dismissal for the reasons
7 that the government's argument identified. The government
8 argues that essentially this is a fact dispute as opposed to a
9 legal impediment to proceeding on the counts at all, if it is
10 even that. So I'm going to overrule the motion as to that
11 count, as well.

12 Finally, Fourteen through Twenty-two, Twenty-four
13 and Twenty-seven are the money laundering charges. I don't
14 think that there is an unconstitutional as applied argument
15 here that warrants dismissal at this stage.

16 The alleged facts in this quite detailed
17 indictment set out the steps that Mr. Stockman allegedly took
18 to launder the money. Again, Mr. Stockman is fully on notice
19 of what the government's case consists of. I don't think there
20 is an unconstitutional as applied basis for dismissal of these
21 counts.

22 So if you want to talk about the motion to
23 strike, I'm otherwise denying the motions to dismiss.

24 MR. BUCKLEY: Yes, Your Honor. Thank you.

25 The motion to strike surplusage relates to the

10:19 1 allegations with regard to the Ross Center, and Person A is
2 deceased, which does relate to part of the delay that I
3 complained about. And to clarify, in the government's response
4 in opposition, there was an analysis of a pre-indictment speedy
10:19 5 trial delay. That is not the allegation that I have made.
6 That's not the basis of the complaint that we have.

7 The basis of my complaint is that the Ross Center
8 allegations are not sufficiently connected with a common
9 element of misrepresentation to the other allegations in the
10:19 10 indictment. They are not independently charged in the
11 indictment, and the only purpose of them in the indictment is
12 to inflame the jury into believing that there is a greater
13 fraud scheme than there actually is and to confuse the issues.
14 That's the substance of our complaint about the surplusage
10:20 15 regarding the Ross Center. Thank you.

16 THE COURT: Response?

17 MR. ELLERSICK: Your Honor, it is our view that the
18 indictment alleges a single scheme, and it is a single scheme
19 with a common purpose, common manner and means, common victims,
10:20 20 common participants, common misrepresentations, that the fact
21 that the entity is the Ross Center is really beside the point
22 because the scheme relied on Mr. Stockman's use of these sham
23 charities.

24 The only thing that mattered was that they had a
10:20 25 501(c)(3) status so he could get money from these donors. That

1 is set out in the indictment where he is using the Ross Center
2 for a period of time to defraud Person A. The Ross
3 Center 501(c)(3) status elapses, and that becomes apparent so
4 he has to switch over to now using a different one, Life Belt
5 Limits, but the names of the entities doesn't matter. What
6 matters is that it was this sham 501(c)(3) to get money from
7 these victims. And the fact that there is no wires or mails
8 charged in connection with the 2010 conduct is not fatal
9 because that conduct is necessary to show Mr. Stockman's intent
10 to defraud; that he has been doing this for a long time. He
11 did it with Person A even before the counts charged in the
12 indictment. And so it is not surplusage because it's necessary
13 to prove, one, the scheme to defraud, and, two, the intent to
14 defraud.

15 We will just say with respect to the delay --

16 THE COURT: Clearly he filed within the statute of
17 limitations. That's not the issue. The only question is
18 whether there was some sort of nefariousness about knowing that
19 the 80-year-old man was going to not reach his 81st birthday
20 and that he sadly died during the interim. Both sides are
21 deprived of his testimony. The government argues that they
22 would have been helped far more than the defendant would have
23 been helped had the gentleman been with us long enough to have
24 at least been deposed.

25 MR. BUCKLEY: Our position is, of course, that the

1 opposite would be true.

2 THE COURT: Well, I understand that's your position.

3 MR. ELLERSICK: I will just say, Your Honor, that
4 there is total speculation that the government sat on this, and
5 the Court knows that the government was not sitting on this
6 because we were in front of the Court on multiple occasions,
7 working diligently to put this case together.

8 THE COURT: The Court knows that because when you are
9 working, I ended up doing some work, as well, so I certainly am
10 aware and the record does reflect diligent pursuit of the claim
11 of the indictment. And I cannot punish the government by
12 striking in a way that would suggest that they were dilatory
13 for any nefarious purpose. They were not. Nor do I believe
14 that there is a sufficient basis to conclude unfair prejudice
15 or delay on the motions to -- so I'm denying the motion to
16 dismiss on the basis of delay with respect to the motion to
17 strike. And to the extent delay is part of that, it is also
18 denied on that basis. To the extent it goes to the other
19 points you have raised, I don't think there is a sufficient
20 basis on this record, given the indictment, to strike. I'm
21 going to deny that motion.

22 I have given you the questionnaire, and I
23 basically adopted what the parties suggested. I made some
24 revisions to try to make it a little easier to read. I would
25 urge that you guys go through this again and see if you can

1 shorten it in any way. I ask that because it is simply
2 burdensome for civilians, the good men and women of the 13
3 counties from whom we draw our panels, to require them to fill
4 out this as an introduction to the multi-week trial that they
5 will then have to be involved in. I'm afraid you are going to
6 scare people away, among other things. So what I would like
7 you to do -- I'm going to grant your request to do this
8 questionnaire or an expanded questionnaire in lieu of the
9 standard court questionnaire. I will honor both parties' need
10 to get the answers to the completed questionnaires in advance.
11 We haven't talked about how large the panel might be, but I
12 assume you will want at least 50 people and maybe 75. And if
13 that is true, you will need even more time to go through the
14 materials. So we will have to think through and talk to the
15 jury people about what the best way to get this done is. And
16 so at our next hearing, we will address those logistics. In
17 the meantime, review, confer and report on whether it can be
18 shortened and get me a preferably joint revised questionnaire
19 that might be somewhat crisper.

20 What else do we need to take up today?

21 MR. HEBERLE: I think that's it from the government,
22 Your Honor. Just briefly, on the matter of the questionnaire,
23 there are a couple questions that the defendant proposed I
24 think we would object to, but we can raise that later. It's
25 "list your favorite U.S. president" and that kind of thing.

1 THE COURT: I think I probably took those out. I may
2 have. I just don't remember. I generally don't like those
3 either. Some of them though -- this is an unusual case.
4 Questions that might be inappropriate in other cases may be
5 more appropriate here simply because of the inevitably -- just
6 the nature of the case.

7 MR. BUCKLEY: My rationale for that question, Your
8 Honor, understanding that it was odd, was that it was a
9 seemingly less intrusive way of getting to the meat of
10 something than something perhaps more pointed.

11 THE COURT: But I'm not sure what you are going to do
12 with the answer. What are you going to do with an answer that
13 says Abraham Lincoln? What are you going to do with an answer
14 that says Donald Trump? What are you going to do with an
15 answer that says Bill Clinton? That's my biggest concern with
16 something like that.

17 MR. BUCKLEY: Understood.

18 THE COURT: All right.

19 MR. HEBERLE: I think that our philosophy in preparing
20 our questionnaire, at least, Your Honor, was that it is fair
21 game to ask: Have you been a member of a nonprofit
22 organization or have you served in a position on a campaign?
23 But what we don't want to do is to try to get into people's
24 political philosophies.

25 THE COURT: I agree, because we are going to be

1 emphasizing over and over that this case does not turn on
2 whether you agree or disagree with anything Mr. Stockman said
3 that was political. I think that is going to be -- on the one
4 hand, we want to identify people who are so political
5 themselves that they couldn't be fair to Mr. Stockman or the
6 government. On the other hand, we want to emphasize that this
7 is not a case about the jurors' or Mr. Stockman's political
8 views. So we are kind of walking that line, as I see it.

9 MR. HEBERLE: Yes, Your Honor. And we will confer
10 with the defense in an attempt to come up --

11 THE COURT: When is our next interim status
12 conference, Lisa?

13 THE CASE MANAGER: January 12th.

14 THE COURT: That's a good time, January 12. At that
15 conference, we will work through as many of these logistics as
16 possible. Okay?

17 MR. HEBERLE: Thank you.

18 THE COURT: I take it discovery is proceeding without
19 any problem?

20 MR. HEBERLE: Yes, Your Honor. The vast majority of
21 it has already been provided, but we are also producing
22 additional materials on a rolling basis as they come in.

23 THE COURT: Okay. Very good. Thank you very much.

24 MR. HEBERLE: Thank you.

25 *(Court adjourned at 10:28 a.m.)*

* * * *

I certify that the foregoing is a correct transcript from
the record of proceedings in the above-entitled cause.

Date: December 22, 2017

/s/ Mayra Malone

Mayra Malone, CSR, RMR, CRR
Official Court Reporter